Durham School Services LP and Laborers International Union of North America Local 509. Case 14–RC–12713

March 31, 2009

DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The National Labor Relations Board has considered an objection to an election held October 17, 2008, and the Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 59 for and 77 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions, and adopts the Regional Director's findings and recommendations, and finds that the election must be set aside and a new election held.²

Were he writing on a clean slate, Member Schaumber would permit both employers and unions to reimburse employees not scheduled to work during polling hours for reasonable transportation expenses (actual or approximated based upon averages or good faith estimates) incurred in travelling to the polling place. He also would permit both unions and employers to reimburse employees (whether on duty or off) for actual wages unavoidably lost because of voting, and would further consider a reasonable reimbursement for an employee's lost time while off of work. He would require that the offer be made to all eligible voters, and that the offer include a statement that the reimbursement is intended solely to increase participation in the election by covering reasonable transportation expenses and lost wages or lost time, as applicable, and that it is not intended to interfere with or influence how employees vote in the election; the choice is entirely the employees' to make. If such a disclaimer is included with the offer, Member Schaumber would not find the offer objectionable simply because it is accompanied by noncoercive and otherwise lawful exhortations to vote for or against the Union. In Member Schaumber's view, we should encourage broad participation in Board elections; neutral, noncoercive

ORDER

IT IS ORDERED that this matter is remanded to the Regional Director for further appropriate action.

REGIONAL DIRECTOR'S REPORT ON OBJECTIONS, ORDER APPROVING WITHDRAWAL OF CERTAIN OBJECTIONS AND RECOMMENDATIONS

This report contains the Regional Director's recommendations regarding the objections filed by the Petitioner. The Petitioner withdrew all but its third objection, which alleges that the Employer offered payment to employees to come to the facility on the day of the election. The investigation of the objection established that the Employer offered and paid employees not scheduled to work on the day of the election 2 hours' show-up pay. As described below, it is recommended that the Petitioner's Objection 3 be sustained and that a rerun election be conducted.

Procedural History

Pursuant to a petition filed on May 15, 2008,¹ and a Stipulated Election Agreement approved by the Regional Director on June 9, an election was conducted on October 17, among employees of the Employer in the following-described appropriate collective-bargaining unit:

All full-time and regular part-time drivers and monitors employed by the Employer at its 6121 Hall Street and 3350 Morgan Ford, St. Louis, Missouri facilities, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act.

offers of reimbursement foster that objective by minimizing the financial burden of exercising one's Sec. 7 rights.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

² Relying on *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), and its progeny, *Rite Aid Corp.*, 326 NLRB 924 (1998), and *Lutheran Welfare Services*, 321 NLRB 915 (1996), the Regional Director found that the Employer engaged in objectionable conduct by offering off-duty employees 2 hours' show-up pay to come to its facility on the day of the election. Member Schaumber notes that the facts in *Sunrise* are markedly different from the facts presented in this case but that the Board extended the holding in *Sunrise*, *Rite Aid Corp.*, and *Lutheran Welfare Services* to find objectionable conduct based on facts similar to those presented here. Consequently, he adopts the Regional Director's finding for institutional reasons, as it is consistent with extant Board precedent.

All dates are in the year 2008 unless otherwise specified.

The results of the election were as follows:

Approximate number of eligible voters	158
Void ballots	1
Votes cast for Petitioner	59
Votes cast against participating	
labor organization	77
Valid votes counted	
Challenged ballots	1
Valid votes counted plus challenged ballots	

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has not been cast for the Petitioner.

Timely objections to conduct affecting the results of the election were filed by the Petitioner on October 22.²

On November 13, the Petitioner submitted a written request to withdraw its objections with the exception of Objection 3.³

Having carefully considered the matter and having concluded that withdrawal of Objections 1, 2, and 4 is not inconsistent with the purposes and policies of the Act,

IT IS HEREBY ORDERED that the Petitioner's request to withdraw its Objections 1, 2, and 4 is approved.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, I have caused an investigation to be made of the Petitioner's Objection 3. I have carefully considered all evidence adduced during the investigation, and I report and recommend as follows:

Background

The Employer, with facilities located at 6121 Hall Street and 3350 Morgan Ford, St. Louis, Missouri, is engaged in providing school bus transportation services.

Objection

In Objection 3, the Petitioner alleges that the "Employer offered payment to employees to come to the facility on the day of the election" and paid employees not scheduled to work 2 hours of pay if they showed up on the election day. In support of its objection, the Petitioner presented witnesses who provided sworn evidence and a flyer that states, in part:

URGENT SHOW UP PAY

TWO HOURS PAY

As you know ...

Because Durham believes that it is important that you are given an opportunity to exercise your right to vote, the Company will pay anyone not scheduled to work on Friday at the request of your school district two (2) hours of pay if you show up at work and check-in with dispatch while the polls are open.

Please understand that this does not mean you have to vote and if you vote, you may vote either "yes" or "no."

The Petitioner presented five witnesses, all of whom were eligible voters. The Petitioner's first witness stated that the Employer required employees to attend two mandatory meetings at which the Employer presented its arguments against employees voting in favor of the Union. The first meeting was held on about October 3, 2007. After this meeting, a flyer was attached to the clipboard that held this employee's daily routes. While the employee did not retain the flyer, the employee remembered the word "URGENT" and that employees would get 2 hours pay if they showed up to vote. Another meeting was held on October 15. At that meeting, Rick and Jim, two corporate managers spoke to employees. Jim stated, "If you are off work and show up to vote on Friday you will get 2 hours show-up pay. Let dispatch know you are here."

The Petitioner's second witness stated that at a mandatory meeting on October 15, in which the Employer campaigned against the Union, Rick, a manager for the Employer, told employees they would get 2 hours show-up pay if they came in to vote on their day off. Upon arriving at the facility on the day of the election, this witness, who was not scheduled to work, checked in with dispatch, advised the employee was there to vote, signed in on a list, voted, and left. On the next payday, the employee's payroll register report indicated the employee received 2 hours show-up pay.

A third witness who attended a second mandatory meeting on October 15, states a manager whose name he did not know said, "If you are off work and show up to vote on Friday you will get 2 hours show-up pay. Let dispatch know you are here." The employee received the above-described flyer upon leaving this meeting and stated the Employer also placed the flyer on employees' clipboards, the bulletin board, and left it in the breakroom and working area. On election day, the employee, who did not work, went to dispatch, signed for the employee's check, and then voted and left. The employee received 2 hours show-up pay as indicated in the employee's payroll register report.

The fourth witness testified that a flyer was on the employee's route clipboard the day before the election and remembered the flyer was marked "URGENT" and stated employees would get 2 hours pay if they came in on their day off to vote.

The Petitioner's fifth witness, who works at the other facility, testified that employees where required to attend meetings and attended a meeting on October 15. During the meeting, a Regional manager for the Employer, whom the witness believes is Rick, told employees, "Anyone who is off work will get paid 2 hours for coming in to vote. I don't care how you vote." The witness also stated that between voting sessions on the day of the election, the employee saw that the dispatcher had a list of names on the counter, the type of list employees sign to acknowledge their presence at mandatory meetings such as safety meetings, indicating which employees had been there that day.

The Employer asserts that it lawfully offered to compensate off-duty employees for costs associated with travel on the day of the election and expressly told them they were free to vote either for or against the Union. In support of its position, the

² A copy of the Petitioner's objections is attached as Exh. 1.

³ A copy of the withdrawal request is attached as Exh. 2.

⁴ A copy of the flyer is attached as Exh. 3.

Employer provided identical prepared affidavits that only required employees to fill in their name, address, telephone number, job classification, and employment date, and sign and date the affidavit before an Employer representative. These prepared affidavits state in part:

- 6. I received two (2) hours of show-up pay on October 17, 2008
- 7. The Company expressly told me that the show-up pay was not a bribe related to voting and, based on the Company's communication, I understood the purpose of the show-up pay was to reimburse me for my time and travel expenses.
- 8. The Company told me that to receive the show-up pay I did not have to vote and if I voted, I could vote "yes" or "no."
- 9. The two (2) hours of show-up pay had no impact on whether I voted or how I voted.

Two of the 39 employees who signed the prepared affidavits amended the affidavit to read that they drove a charter on October 17, thus receiving pay for working and not show-up pay. Two of the 39 employees who signed the prepared affidavits struck paragraphs 7 and 8 from the affidavits they executed. One employee struck paragraph 7, and another struck "that to receive the show-up pay I did not have to vote and if I voted" from paragraph 8. None of the employees made any other changes to the affidavits.

In Sunrise Rehabilitation Hospital, 320 NLRB 212 (1995), the Board held that an employer's monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses amount to a benefit that reasonably tends to influence the election outcome. In Sunrise, the employer distributed a handbill to most employees that stated, in part, that report pay of 2 hours would be paid if an employee was not scheduled to work on the election date and came in for the election. Unlike the Employer here, where the unscheduled employees had to check in with dispatch while the polls were open, in Sunrise it was not necessary for the employees to report to their supervisor or prove that the employees actually voted as along as the employees came in and properly recorded their time. In addition, in Sunrise the employer offered to provide transportation to and from the facility and child care during the hours the polls were open for employees not scheduled to work the day of the election. The handbill ended with the employer encouraging employees to vote "no." Here, as noted, the Employer stated employees may vote either "yes" or "no."

In *Sunrise*, in determining the employer's offer of pay was objectionable, the Board took into account such factors as the size of the benefit in relation to its stated legitimate purpose, the number of employees receiving it, how the employees would reasonably construe the purpose given the context of the offer, and its timing. The Board found that the benefit was substantial—2 hours' pay without the necessity of doing anything other than showing up on the day of the election. Second, the flyer was generally distributed to most employees and the number of employees potentially affected was more than de minimis. Third, given the absence of any link to transportation

expenses, the Board found that employees would reasonably perceive the 2 hours' pay as a favor from the employer which the employees might feel obligated to repay by voting against the union, as the employer requested.

Here, like Sunrise, the Employer offered 2 hours' show-up pay for employees who were not scheduled to work on the election day. The flyer was attached to employees' clipboards along with their daily routes and otherwise distributed at meetings and at the Employer's facility. As noted, the Employer presented evidence that at least 37 eligible voters received 2 hours' show-up pay, clearly more than de minimis where only 18 more votes were cast against the Petitioner than for the Petitioner. Finally, there is no evidence that the 2 hours' show-up pay was in any way linked to transportation expenses. While the Employer's witnesses stated the show-up pay had no impact on whether or how they voted, I need not inquire into the subjective reactions of the potential recipients of the benefit. The standard is an objective one—whether the challenged conduct has a reasonable tendency to influence the election outcome. Sunrise Rehabilitation Hospital, supra.

In cases since *Sunrise*, the Board has found that the employer engaged in objectionable conduct by the single act of offering 2 hours' of pay to off-duty employees who came in to work to vote in the election. The employers did not describe the payment as reimbursement for transportation costs or other expenses associated with traveling to the election site. *Rite Aid Corp.*, 326 NLRB 924 (1998); *Lutheran Welfare Services*, 321 NLRB 915 (1996).

The Employer argues that if employees are paid \$10 per hour after taxes that would amount to \$8 per hour, or \$16 for 2 hours of pay. Payroll information or an average hourly rate of pay for employees was not submitted, but the Petitioner's witnesses stated they earned more than \$12 to nearly \$15 per hour. The Employer then computes mileage reimbursement at the Internal Revenue Service rate of 58.5 cents per mile, which would equate to compensating employees for an approximately 27mile round trip. The fact remains, however, that there is no evidence that employees' 2 hours' show-up pay was in any way linked to transportation expenses. Two employees who live in the same zip code as the facility they voted at received the same amount of show-up pay as an employee who lives in High Ridge, Missouri, and another employee who lives in Centreville, Illinois. In addition, employees were never told that the show-up pay was linked to their transportation expenses.

Contrary to the Employer's contention, I find the Board's decision in *New Era Cap Co.*, 336 NLRB 526 (2001), is distinguishable. In *New Era*, the employer posted a notice on the morning of a union-affiliation vote election urging employees to vote against affiliation, and offered all on-duty employees free transportation to and from the polling station and reimbursement of one-half hour wages to compensate the employees for the time it took them to vote. As that case states, an employer may provide transportation to and from a polling station, provided that the benefit is offered on a nondiscriminatory basis, and the employees are free to accept or reject the offer. Further, the compensation paid to employees to vote was valued at only \$5 per employee. This is similar to *Allen's Electric Co.*, 340 NLRB 1012 (2003), where the union offered to

reimburse voters for wages lost because of voting. Both of these cases compensated employees for lost work hours because of the election. Here, employees were not losing any work hours, rather they received 2 hours' show-up pay they otherwise would not have received.

In these circumstances, I find that the Employer's offer of 2 hours' show-up pay constituted an offer or payment for employees' time and a reward for coming in to vote, the Employer did not describe this show-up pay as reimbursement for transportation costs and it exceeded reimbursement for actual transportation expenses, reasonably tended to influence the election outcome, and is objectionable conduct sufficient to warrant setting aside the election. Sunrise Rehabilitation Hospital, supra; Rite Aid Corp., supra; Lutheran Welfare Services, supra. See also, Perdue Farms, 320 NLRB 805 (1996).

Accordingly, I recommend that Objection 3 be sustained.

Conclusion and Recommendations

Having approved the Petitioner's request to withdraw Objections 1, 2, and 4, and having recommended that Objection 3 be sustained, I further recommend that the election be set aside and that a rerun election be conducted.⁵

November 20, 2008

⁵ Under the provision of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC. Exceptions must be received by the Board in Washington by December 4, 2008.

Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party filed with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.



October 22, 2008

National Labor Relations Board Region 14 1222 Spruce, Room 8.302 Saint Louis, MO 63103-2892

Durham School Services- Employer

Dear Region 14 officials

Laborers' Local 509 of the Laborers' Internations to the employers conduct in the in the above report for the following reasons:

- 1.
- The Excelsion list provided by the employer contained in accurate addresses for a significant number of employees. Employer indicated possible closure of facilities as a result of electifavor the union. 2.
- Employer offered payment to employees to come to the facility on the da
- or me election.

 In close proximity of time to offering payment for coming to the facility on Election Day the employer indicated to the employees that only those voting would determine that outcome of election and could result in a

By these acts and other acts and conduct the employer cons required for the exercise of rights under the Act.



November 13, 2008

Chairman Edward M. Smith LIUNA Vice President, Midwest Regional Manager and Assistant to the General President

Board of Delegates

Eastern Missouri Laborers' District Council Ernic Brown, Vice Chairman Business Manager

Great Plains Laborers' District Council John Penn, Treasurer Business Manager

Indiana Luborers' District Council Mike Short Business Manager

Southern & Central Illinois Laberers' District Council John R. Taylor Business Manager

Southwestern Illinois Laborers District Council Glyn Ramage Business Manager

Western Missouri & Kansas Laborers' District Council Stacey Salmon Business Manager

Administrator John J. Reid Director National Labor Relations Board Region 14 1222 Spruce, Room 8.302 Saint Louis, MO 63103-2892

VIA FACSIMILE Attention Board Agent Brigman, FX

RE: Objections to Election by Laborers' Local 509 LIUNA and Durham School Services-Employer

Board Agent Brigman, FX,

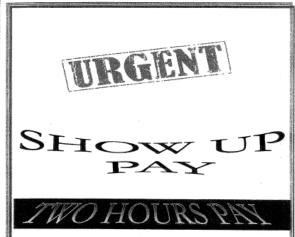
Laborers' Local 509 of the Laborers' International Union of North America filed objections to the Election in the above referenced matter. Local 509 hereby withdraws the objections to election with the exception of Objection #3 – specifically, the objection that "Employer offered payment to employees to come to the facility on the day of the election."

If you have any questions regarding this matter, please do not hesitate to contact me.



Cc: John F. Penn, LIUNA Vice President and Midwest Regional Manager David Penn, Director MROC Steve Fols, LIUNA International Representative Cynthia Cummings, Business Manager LIUNA Local 509

Laborers' International Union of North America "Representing Workers For Over 100 Years" EXHIBIT 2



As you know, the election on Friday was scheduled last school year. As a result we did not know that many of you would be off of work at the request of your school district.

Because Durham believes that it is important that you are given an opportunity to exercise your right to vote, the Company will pay anyone not scheduled to work on Friday at the request of your school district two (2) hours of pay if you show up at work and check-in with dispatch while the polls are open.

Please understand that this does not mean you have to vote and if you vote, you may vote either "yes" or "no."

EXHIBIT 3